**IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA**

CWP No.616 of 2004

Date of decision 20.6.2007

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Ex.Hav.Prakash Chand Petitioner

Vs.

Union of India and others Respondents

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Coram:

The Hon'ble Mr.Justice Rajiv Sharma,J.

Whether approved for reporting?[1] Yes.

For the Petitioners: Mr. P.P.Chauhan, Advocate.

For the Respondents : Mr.Sandeep Sharma, Assistant .Solicitor General of India.

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**Rajiv Sharma, J.**

The brief facts which can be culled out from the pleadings of the parties are that the petitioner was enrolled in the Indian Army on 18.8.1975 as Sepoy He was down graded to low medical category BEE (permanent) for diagnosis 'CVA Multiple infraction' with effect from 10.2.1993. As per the opinion of the Medical Board (Annexure R-9) the following observation has been made :

"Physical & mental & stress of Military service".

His disability was assessed at 40%. His case was forwarded to the PCDA(P) Allahabad for adjudication on 16.3.1994. His claim was rejected by the PCDA(P) Allahabad on 28.9.1994. Sh.P.P.Chauhan, learned counsel appearing for the petitioner had strenuously argued that his client's disability has been assessed at 40% and as per the rules his client was entitled to disability pension. Sh.Sandeep Sharma, learned Assistant Solicitor General of India, appearing on behalf of the respondents had

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[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

supported the decision dated 28.9.1994 and appellate order conveyed through letter dated 13.6.1996.

I have heard learned counsel for the parties and have also gone through the record of the case carefully.

The petitioner had suffered CVA multiple infraction with effect from 10.2.1993 and his disability has been assessed at 40%. It has specifically been opined by the Medical Board that the disability has been aggravated by the physical, mental and stress of military service. It has also come in the report that the effects of such aggravation existed at the time of the opinion rendered by the Medical Board. The petitioner had submitted his willingness not to serve only due to his deteriorating health. His disability had been assessed at 40% by the duly constituted Medical Board and it was on that basis that he could not discharge his duties efficiently. The Commanding Officer while recommending his case has specifically mentioned 'Yes' in the column whether LMC is due to attributable to service. In view of this the PCDA (P), Allahabad could not reject the case of the petitioner for disability pension.

The act of the respondents of putting the petitioner under Rule 13 (3) Item III (iv) of the Army Rules, 1954 is not in accordance with law. The sole reason for discharge of the applicant was on medical grounds on the basis of medical opinion given by the Medical Board. He was to be placed under category 13(3) Item No.II (ii).

It can also be viewed from another angle. When the petitioner was enrolled in the Army he was hale and hearty. He had served the Army with effect from 1975 onwards. He has contracted the disease during his Army service and on that basis his disability has been assessed at 40%. The Medical Board had opined that the disease has been aggravated on account of physical, mental and stress of military service. If that was so the disability itself is attributable to military service. The Delhi High Court

in **Ex.Subedar Baljor Singh v. Union of India and others,** 1997 LAB. I.C. 1818 has held as under :

> "Having once acquired the eligibility for being granted the disability pension and disability benefits at a stage when the petitioner was placed in low medical category (permanent), he could not have been denied the benefit of the same in case he sought and was allowed discharge later on due to the same ailment due to which he was placed in low medical category. Army order 146/77 to suggest that category 'C' JCO embraces all personnels, who are not fit for active service with units/formation Head Quarter involved in actual fighting but are fit for such duties which do not involve severe strain. On the day when the above request was made, the petitioner had made a request for exemption to perform night duty because of his medical condition. The application dated 30.3.1994, in which he sought exemption stated that being handicapped, the doctors had placed him in low medical category and that the artificial limb cannot be worn by him for more than an hour, as such he was having constant pain in amputated right leg. When this request was not acceded to, which could have been allowed had instructions contained in Army Order 146/77 been correctly followed. Faced with this situations, the petitioner was left with no other option except to move an application for discharge on medical ground, which was also recommended on medical grounds by the Commanding Officer in the following words:-
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> > "JC-13449K, Sub (Trir) Baljor Singh of this unit met with an MT accident on 02 FEB 93 and was hospitalized. The Rt. leg (below knee) of the JCO was amputated at Base Hosp., Lucknow on 08 FEB 93. The JCO was given an Artificial Limb and was placed in low med cat CEE (Permt) w.e.f. 10 Feb,93. There is no specific restriction advised on the employability by the med auth except those specified under AO 146/77.
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> > 2. The JCO has put an application for premature retirement from service on med. grounds. The JCO is due for normal retirement in Mar.2003.
> > 3. I have personally known the actual facts of the case of the JCO as he is not feeling comfortable due to recurring pain at his right leg.
> > 4. Under these circumstances, having fully weighed the pros and cons of the case, the premature disch of this JCO from service is strongly recommended.
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> > Station: C/0 56 APO Sd/-
> > Dated 19 Apr. 94 ( J.S.Brar)
> > Lt. Col.
> > Commanding Officer."

It was on the aforementioned recommendation that the petitioner was discharged. The discharge of the petitioner, may be on his own request, in the circumstances aforementioned above has to be treated as a discharge due to medical grounds, during the extended period of retention. It was not due to any other reason, but was due to medical grounds. Had it been on any other ground other than medical grounds, the petitioner would not be entitled to any relief. It was because of low medical category (permanent) that the petitioner was unable to discharge the duties during the extended period of service due to the duties, performance of which involved stress and strain not commensurate with the medical category of the petitioner. When discharge was sought on medical grounds and it was recommended also on medical grounds, such discharge has to be treated as a discharge on medical grounds. May be that for the purpose of petitioner submitted his request, which was duly recommended by the Commanding Officer that it was because of the medical condition of the petitioner as a direct result in the injuries sustained by him."

Consequently the request of the petitioner for discharge was to be considered on medical grounds and he is to be placed under category 13(3) Item No.II (ii) of the Army Rules, 1954. The next question which requires consideration by this Court is that whether the disability is attributable to service or is merely aggravated by the military service. The relevant Pension Regulation construing this issue is Appendix II framed under the Pension Regulation. The relevant para 7(b) of Appendix II reads as under:

> 7. (b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been directed on medical examination prior to acceptance for service the disease will not be deemed to have arisen during service. "

The respondents have not placed any material on record to substantiate that the petitioner was suffering of the ailment as noted above at the time of his enrolment. No note has been produced before this Court

that he was suffering from any ailment at the time of his initial enrolment. This Court is of the opinion that the petitioner's disease is attributable as well as aggravated by the military service. This Court is fortified in coming to this conclusion on the basis of the opinion of the Medical Board as discussed above.

The Jammu and Kashmir High Court in **Col. M.L.Sethi (Retd.) and etc. v. Union of India and others,** 1998 LAB. I.C. 3625 has held as under:

> " From the judicial precedents referred to above it can safely be concluded :-
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> (i) That in case no mention is made regarding the disease or disablement at the time of entry in service, then it is to be presumed that the disability occurred during the course of service.
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> (ii) The disability was on account of stress and strains of army service.
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> (iii) If competent authority is to disagree with the finding recorded by the medical board vis-à-vis the disability or the percentage thereof, the matter should be referred to the Medical Board.
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> (iv) Delay in approaching the Court is irrelevant. "

The upshot of the above discussion is that the petitioner was required to put in category 13(3) Item No.II (ii) instead of under category 13 (3) Item III (iv) of the Army Rules, 1954. The disease which has led to his discharge from the service is attributable as well as aggravated by the military service. The claim of the petitioner has been wrongly rejected by the authorities for payment of disability pension. The petitioner is entitled to disability pension with effect from his duty with effect from 28.2.1994.

Accordingly this writ petition is allowed. Annexures P-4, P-6 and P-8 dated 10.10.1994, 13.6.1996 and 22.6.2004, respectively, are quashed and set aside. The petitioner is held entitled to disability pension on the basis of his disability assessed at 40% with effect from 28.2.1994 with interest at the rate of 12% Per Annum. The respondents are directed to work out the disability pension within a period of eight weeks from today.

June 20, 2007(g) **( Rajiv Sharma ), J.**